CITIBANK, N.A.

v.

MIDF CONSULTANCY & CORPORATE SERVICES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[NO: D5-24-270-95]
19 DECEMBER 1995

COMPANY LAW: *Rectification of share register - Failure of purchaser to register shares into his name - Effect.*

EVIDENCE: *Adducing fresh evidence after full arguments and judgment reserved - Principles applicable - Whether evidence could not have been obtained with reasonable diligence for use at trial.*

SALE OF GOODS: *Sale of shares in company - Nemo Dat principle - Whether exception in s. 27(1) Sale of Goods Act 1957 applicable - Whether there was a prior defect in buyer's title - Bona fide purchaser for value.*

LEGAL PROFESSION: *Duty of solicitor/Counsel preparing affidavit to be affirmed by client - Erroneous concession by Counsel - Duty of the Court.*

The plaintiffs applied by way of originating summons for an order that the register of members and index of members of Malaysian Airline System Bhd. ("MAS") maintained by the 1st defendant be rectified so as to delete the name of the 2nd defendant as the registered shareholder of three lots of MAS shares held under share certificate nos 730583, 730582 and 730581 and be replaced by the name of the plaintiffs as the registered shareholders thereof.

The application was supported by an affidavit affirmed on 18 July 1995 stating to the effect that 300,000 out of 500,000 MAS shares together with the transfer forms executed in blank received by the plaintiff on or about 17 November 1992 from one of their clients as security for banking facilities were reported missing or stolen on or about 21 February 1995. Details of the 300,000 shares with their share certificate numbers were exhibited. A police report lodged on 24 February 1995 stated quite unequivocally that the said 300,000 shares were stolen from a safe in the plaintiffs's premises. On 2 March 1995 the plaintiffs' Singapore solicitors wrote to the 1st defendant enclosing a statutory declaration also dated 2 March 1995 requesting them to notify the Kuala Lumpur Stock Exchange to stop dealings in the relevant stolen shares. On 11 March 1995 the plaintiff's Kuala Lumpur solicitors also wrote to the 1st defendant enclosing a further statutory declaration setting out details of the balance 200,000 missing shares and making a similar reguest. On or about 21 March 1995 the plaintiffs'

Malaysian solicitors were informed by the 1st defendant that 49,000 shares had been registered to various third parties whereupon the said solicitors sent a notice to the 2nd defendant that they had purchased shares that were in fact stolen and that therefore they had acquired no legal title and or legal possession of the same and that they were to deliver up the replaced issued to the plaintiffs.

The 2nd defendant replied by way of an affidavit affirmed on 21 September 1995 denying the various allegations of the plaintiffs and contending that the said shares were properly registered in their name. They averred that on 17 February 1995 they purchased the shares in question then bearing certificate nos. 524585, 524599 and 524600 among 75,000 other MAS shares on behalf of one of their clients and sent the same for registration into their names on 23 February 1995 and the same were duly registered. They contended that they were *bona fide* purchasers of the shares. On or about 18 May 1995 the 2nd defendants sold the shares in question in a block of 842,00 shares in MAS to a third party.

The plaintiffs filed another affidavit in reply dated 13 October 1995 exhibiting a lodgement form dated 17 November 1992 from the plaintiffs to its customer, one Low Tick showing that 200 lots of MAS shares including the aforesaid certificate nos. 524585, 524599 and 524600 were lodged with the plaintiffs. Further, the said affidavit contained an averment which did not tally with the document exhibited in support thereof.

In reply thereto the 2nd defendants affirmed a further affidavit on 22 November 1995 denying that there was any evidence showing the plaintiff's claim to the disputed shares and that there was a total lack of evidence that the disputed shares which were alleged to be missing were taken from the plaintiffs' safe.

The only issue was whether the 2nd defendants could acquire a good title to the 3,000 MAS shares in question on the basis that they were the *bona fide* purchasers for value without notice.

After the parties had argued the case and judgment had been reserved plaintiffs's solicitors wrote to Court to defer delivery of the judgment to enable the plaintiffs to obtain documents relating to possession of the shares and requested time to file a further affidavit to clear up the issue of possession.

The learned Judge directed both Counsel to submit on the issue whether such fresh affidavit could be allowed. Counsel for the defendant conceded that this matter ought to be converted to writ action pursuant to O. 28 r. 8 of the Rules of the High Court 1980.

Held:

[1] Counsel who prepares an affidavit to be affirmed by his client, ought to draft an affidavit reflecting the true facts to supports his client's case. It is not only a legal but a moral duty of a practioner to draft an affidavit without jeopardising his client's case.

[2] The exception to the *nemo dat* principle found in s. 27(1) of the Sale Goods Act 1957 did not apply in this case. The plaintiffs themselves were uncertain whether the said shares were stolen, missing or otherwise misplaced. No evidence was led to show with finality that the shares were indeed stolen. The plaintiffs failed to establish a *prima facie* case of ownership to the shares.

[3] There was not a shred of evidence to back the plaintiffs' claim that the shares were stolen or missing or that they formed part of the missing shares. If a purchaser does not register his shares into his name he takes the risk if a *bona fide* purchaser of the legal title for value and without prior notice of his interests, obtains a good title to the shares.

[4] The plaintiffs' right to adduce fresh or further evidence after the case had been argued and judgment reserved was subject to the principles enunciated in *Ladd v. Marshall* [1954] 3 All ER. The plaintiffs failed the first test to justify reception of fresh evidence i.e. it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

[5] Notwithstanding Counsel's concession that the matter ought to be converted to a writ action, the Court refused to do so since the matter had been fully argued and the related issues were aptly canvassed. If Counsel erroneously makes a concession it is the duty of the Court as the proper arbiter to see if the concession is acceptable. In this case, to accede to the second defendant's request, is akin to giving the plaintiffs a second bite at the cherry.

[Plaintiffs' application dismissed with costs]

Cases referred to:

Phung Hoe Seng @ Phang Hoe Seng v. United Malayan Banking Corporation Berhad [1995] 4 CLJ 24 CA ***(cit)***

Pan-Electric Industries Ltd. (in liquidation) v. Overseas-Chinese Banking Corp. Ltd. & Anor. [1994] 3 SLR 695 ***(dist)***

Ladd v. Marshall [1954] 3 AER 745 ***(foll)***

Asiatic Development Bhd. & Anor. v. Balachandar a/l Palanysamy [1996] 1 CLJ 725; [1995] 3 MLJ 445 ***(refd)***

Lam Soon Sim v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***

Legislation referred to:
Rules of High Court 1980, O. 28 r. 8
Sales of Goods Act 1957, s. 27(1)

Other sources referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 13th Edn., 1990 p. 954

JUDGMENT

Kamalanathan Ratnam JC:

This is an originating summons filed by the plaintiffs. The said application prayed for the following orders as against the defendants:

1. Bahawa daftar Ahli-ahli dan Indek Ahli-ahli Malaysian Airline System Berhad yang disimpan oleh defendan pertama diperbetulkan dengan membatalkan nama defendan kedua sebagai pemegang saham untuk saham-saham berikut:

No. Sijil	Kuantiti	Nama
730583	1 x 1,000	Chase Manhattan (Malaysia) Nominees Sdn. Bhd.
730582	1 x -1,000	Chase Manhattan (Malaysia) Nominees Sdn. Bhd.
730581	1 x 1,000	Chase Manhattan (Malaysia) Nominees Sdn. Bhd.

(Secara kolektif dirujuk sebagai "Saham-saham baru")

2. Memasukkan sebagai ganti nama plaintif sebagai pemegang saham-saham baru;

3. Notis pembetulan ini diserah-simpan kepada Pendaftar Syarikat;

4. Bahawa defendan kedua dengan segera menyerah kepada defendan pertama sijil-sijil saham-saham baru untuk dibatalkan;

5. Sebagai alternatif suatu perintah bahawa defendan kedua membayar plaintif segala kerugian dan atau gantirugi untuk konversi salah (wrongful conversion) saham-saham asal;

6. Bahawa defendan kedua bayar plaintif faedah pada kadar 8% setahun untuk semua jumlah yang didapati dihutang oleh plaintif kepada defendan kedua;

7. Kos untuk dan berkait dengan permohonan ini dibayar oleh defendan kepada plaintif;

8. Apa-apa relif lain yang dianggap adil dan saksama oleh Mahkamah yang mulia ini.

In respect of the said application one Robert Neil Breeden, the Vice President of the plaintiff Bank affirmed an affidavit dated 18 July 1995 stating that on or about 17 November 1992 the plaintiffs received *inter alia* 300,000 Malaysian Airline System Berhad (MAS) shares from one of their clients as security for banking facilities granted to him. These shares which were registered in the name of LWB Nominees Sdn. Bhd. were kept by the plaintiffs with the transfer forms executed in blank. Some time on or about 21 February 1995 he was informed by one Adrian Khoo who was the Relationship Manager in the plaintiff Bank that some MAS shares referred to earlier were missing or stolen. Upon subsequent checking he had ascertained that 300,000 MAS shares were either missing or stolen. Details of the 300,000 shares with their certificate numbers were annexed as exhibit A to the said affidavit. He then instructed the plaintiffs' solicitors in Singapore to write to the first defendants informing them of the missing or stolen shares. He also lodged a police report to this effect on 24 February 1995. It is to be noted that in the said police report the deponent has stated quite unequivocally that the said 300,000 shares were stolen from a safe located on the 11th floor of the UIC Building, Suit 11-02, Risk Management Department of Citibank. Subsequently the Singapore solicitors wrote on 2 March 1995 to the first defendants enclosing a Statutory Declaration of Robert Neil Breeden also dated 2 March 1995 requesting the first defendants to notify the Stock Exchange of Kuala Lumpur to stop dealings in the relevant stolen shares. In the said Statutory Declaration he had stated his belief that the said certificates have been lost or were otherwise missing. Subsequently on or about 11 March 1995 the plaintiffs' Kuala Lumpur solicitors also wrote to the first defendants enclosing a further Statutory Declaration setting out details of the balance 200,000 missing shares and requesting the first defendants to write to the Kuala Lumpur Stock Exchange to stop dealings in the said shares. The plaintiffs averred that when the first Statutory Declaration was made on 2 March 1995 it was not possible for them to obtain the full details of the remaining 200,000 missing or stolen shares. No explanation was given as to why this was not possible.

The plaintiffs further averred that on or about 21 March 1995 their Malaysian solicitors were informed by the first defendants that a total of 49,000 shares had been registered to various third parties. The said solicitors then sent a notice dated 24 April 1995 to the second defendants informing them that they had purchased shares that were in fact stolen and that therefore the second defendants had acquired no legal title and or legal possession of same. A copy of the said letter was however not annexed. The said letter *inter alia* also required the second defendants to deliver up the replaced issued shares to the plaintiffs together with the duly executed transfer forms for cancellation by the first defendants. Alternatively the plaintiffs sought damages for conversion. The plaintiffs contend that they being the equitable chargee and or bailee of the missing or stolen shares have the immediate legal right of possession of same. A draft consent order in respect of two other purchases were annexed

as exhibits. At the outset I take the view that the draft settlement orders were by consent and ought not to have been annexed as they would have no bearing on this case as the defendants are disputing the plaintiffs' claim to ownership of the shares.

In reply to the plaintiffs' affidavit the second defendants' Assistant Manager of Security Services, Loke Swee Wah, affirmed an affidavit dated 21 September 1995 denying the various allegations of the plaintiffs and contending that the said shares were properly registered in their name. The second defendants also disputed the contention of the plaintiffs that they received the said shares as security from their clients and or were kept by them. The second defendants further averred that on 17 February 1995 they purchased the said shares in question among 75,000 other MAS shares for and on behalf of their clients, from Istinet Pacific Ltd. The said shares in question bore Certificate Nos. 524585, 524599 and 524600. The second defendants received the said 75,000 shares from Citibank Berhad, Kuala Lumpur on the same day of purchase.

The second defendants then on 23 February 1995 sent the same 75,000 shares for registration into their names and the same were duly registered accordingly and forwarded to them. They contended that they were *bona fide* purchasers of the said shares. Sometime on or about 18 May 1995 the second defendants sold the shares in question which were included in 842,000 units of shares in MAS to a third party.

Robert Neil Breeden then filed another affidavit in reply dated 13 October 1995 in which he annexed a true copy of a lodgement form dated 17 November 1992 from the plaintiffs to its customer, one Low Tick showing that 200 lots of MAS shares which included MAS share Certificates 524600, 524599 and 524585 (referred to earlier in the affidavit of the second defendants) were lodged with the plaintiffs. He averred that the plaintiffs were then informed by the first defendants vide exhibit RB-2, i.e. letter dated 31 March 1995, that some of the shares allegedly stolen from the plaintiffs had been transferred out and that it was no longer possible for the first defendants to put out an advertisement to restrain further dealings in the shares in question.

The Court has perused the said exhibit RB-2 which is reproduced verbatim:

Our Ref: MAS/LSC/95
Your Ref: OCK/7079

31 March 1995

Lee Ong & Kandiah
Suit 712, 7th Floor
Wisma Mirama
Jalan Wisma Putra
50460 Kuala Lumpur

Attn: Mr. Ong Chee Kwan

Dear Sirs,

Missing MAS Share Certificates

I am pleased to confirm that the number of shares that were transferred out was 49,000 (photocopy attached).

Kindly inform us if we should proceed with the advertisement for the suspended certificates.

Thank you.

Yours faithfully,

for MIDF Consultancy and Corporate Service Sendirian Berhad

Sgd.

Noor Zihan Nordin
As Registrars for MAS

It is obvious that contrary to what has been affirmed the first defendants had requested if they should proceed with the advertisement of the suspended certificates.

It is my view that Counsel who prepares an affidavit to be affirmed by his client, ought to draft an affidavit reflecting the true facts to support his client's case. It is not only a legal but a moral duty of a practitioner to draft an affidavit without jeopardising his client's case. Having seen the lackadaisical manner in which affidavits are prepared by Counsel in cases that come before me, I would venture to say that if a solicitor drafts an affidavit and if factually such an affidavit is proved to be wrong, and if the deponent to the said affidavit is to be charged for making a false affidavit, the law should also consider if there is a case to answer by the solicitor drafting such a false affidavit. After all it is the practitioner who drafts the affidavit and it ought to be his duty to ascertain the truth of such facts. Indeed it is not uncommon for a practitioner to even accuse his colleague of misleading. It is extremely gratifying to see that the Court of Appeal has expressed its total displeasure with regard to unfounded accusations of misleading, levelled against a practitioner, by another.

I quote with total support the pronouncement per curiam of Mahadev Shankar JCA in *Phung Hoe Seng @ Phang Hoe Seng v. United Malayan Banking Corporation Berhad* [1995] 4 CLJ 24 CA where His Lordship said:

> We have noticed an unhappy trend that some practitioners are a little too ready to attack their opponents with allegations of misleading the Court when a contrary submission is made by way of a different interpretation of the same facts. It is a serious matter for one practitioner to accuse another of wilfully

misleading the Court. We deplore this tendency and feel obliged to give notice that if such accusations are made in future without good reasons to justify them, we should take it upon ourselves to initiate the necessary disciplinary action.

Coming back to the case at hand the plaintiffs continued to aver in their affidavit through Robert Neil Breeden that the said shares in question were indeed stolen. I refer to exhibit RB-3 being a letter written by the plaintiffs' solicitors dated 24 April 1995 to the second defendants wherein they contend that the said shares in question were indeed stolen and by which said letter they demanded the second defendants to deliver up to their clients the said shares or pay damages for conversion.

In response to the said affidavit the second defendants replied through Loke Swee Wah who affirmed on 22 November 1995 denying that there was any evidence showing the plaintiffs' claim to the disputed shares. There was a total lack of evidence that the disputed shares which were alleged to be missing were taken from the plaintiffs' safe. They confirmed that they received the said shares on a *bona fide* basis after settlement of the relevant sums and that they had registered the said shares in their name.

At the outset of the hearing Mr. CM Phang who was also mentioning for the first defendants, and who appeared for the plaintiffs informed me that the second defendants had already sold the said shares and that therefore if he was successful, the proper order would be an award of damages only. This fact of the sale of the said shares was confirmed by Counsel for the second defendants. He relied on and repeated the averments in the affidavits of the plaintiffs which I had already narrated *in extensio.* It was also conceded by both parties that the facts were not in dispute. The only issue was whether the second defendants could acquire a good title to the 3,000 MAS shares on the basis that they were the *bona fide* purchasers for value without notice.

It was argued for the plaintiffs that the *Nemo Dat* principle applied in this case and that since the shares were stolen shares, the question of *bona fide* purchasers for value without notice could never prevail, because of prior defect in title. I was referred to s. 27(l) of the Sales of Goods Act 1957 which is reproduced herewith:

> 27. (1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:
>
> Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly

> authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

This issue can be summarily dismissed. The plaintiffs themselves are uncertain whether the said shares were stolen, missing or otherwise displaced. No evidence was led to show with finality that the shares were Indeed stolen. Evidence has been tendered that a certain number of shares were kept with the plaintiffs as security in a safe. No affidavit evidence was led as to who was in charge of the safe and how they could have been stolen or missing. The police report lodged says that the shares were stolen but even a subsequent affidavit and letters refer to missing shares. There is no conclusive evidence to date if the shares were indeed stolen. Mr. Phang readily conceded that in so far as the identification of the shares were concerned he could only rely on what has been averred in the affidavits and that he was unable to identify the numbers of the lost share certificates.

To my mind therefore on this concession alone, the plaintiffs have failed to prove that the said three shares being the subject matter of this claim were indeed amongst the list of shares stolen and which were subsequently found in the possession of the second defendants. The plaintiffs have failed to establish a *prima facie* case to ownership.

Mr. Thomas for the second defendants argued that the plaintiffs have not proven their case at all. He relied on *Bullen & Leake & Jacob's Precedents of Pleadings,* 13th Edition 1990 page 954 which states:

> The plaintiff must show that at the time of the conversion he was either in actual possession of the goods or entitled to immediate possession of them.

He argued that since the three share certificates in question were actually lodged with his clients who had become the registered owner of the same, the plaintiffs had no cause of action.

He also relied on s. 100 of the Companies Act 1965 which states that a certificate under the common seal of a company shall be *prima facie* evidence of the title of the member to the shares. The second defendants referred to *Pan Electric Industries Ltd. (In liquidation) v. Overseas-Chinese Banking Corp. Ltd. & Anor.* [1994] 3 SLR 695. However having read the case I am of the view that the facts are materially different to those at hand. In the *Pan-Electric* case the appellants who at all material times had legal title to shares deposited with Associated Asian Securities (Pte.) Ltd. (called AAS) the said shares including the disputed shares, together with the executed blank transfer forms. AAS then deposited these shares with the two respondents as security for certain banking facilities for their own benefit. The appellants claimed that AAS had no beneficial interest of any kind to transfer, mortgage or otherwise deal with the shares for their own benefit. The Court found after

a a full trial that the appellants had shown that they beneficially owned the shares at the material time. The Court further held that share certificates, even coupled with duly executed transfers in blank, are not negotiable instruments and that their mere delivery would not pass the title in the chose in action to the *bona fide* purchaser or mortgagee for value without notice **if there was**
b **a prior defect of title** (emphasis provided by me).

In the present case, there is not a shred of evidence to back the plaintiffs' claim that the shares were stolen or missing or that they formed part of the missing shares. They have failed to establish a prior defect in title on the part of the second defendants. If a purchaser does not register his shares into his
c name he takes the risk if a *bona fide* purchaser of the legal title for value and without prior notice of his interests, obtains a good title to the shares.

After parties had argued the case before me I reserved judgment to 19 December 1995. My secretary then received a letter dated 15 December
d 1995 from the plaintiffs' solicitors with a copy extended to the defendants' solicitors. The contents of the said letter was to the effect that I defer delivery of my judgment to a later date to enable the plaintiffs to obtain documents relating to possession of the shares. In the circumstances the plaintiffs requested time to file a further affidavit to clear up the issue of possession. It was their
e view that such documents as they intend to further submit would result in the aborting of a full trial. They also confirmed that they had no objections if the second defendants intended to file a further affidavit in reply.

Upon receipt of the said letter, I directed my Deputy Registrar to have both Counsel before me on 17 December 1995 to satisfy me if I ought to allow
f for such fresh affidavit.

Both Counsel appeared before me on 17 December 1995 and Mr. CM Phang merely submitted that in the interest of justice I ought to allow for the further affidavit. His clients he said were trying to liaise with the pledgor of the said shares, Loh Tick, to get the relevant contract notes from the stockbrokers from
g whom he bought the said shares before the pledgor deposited the said shares with the plaintiffs.

Mr. Thomas in reply registered his objections both to the adjournment of the decision and to the filing of a further affidavit. However, I was absolutely
h surprised when he conceded that this matter ought to be converted to a writ action pursuant to O. 28 r. 8 of the Rules of the High Court 1980. By way of clarification I asked him if he was of the view that rather than filing a fresh affidavit it was his view that this petition ought to be converted to a writ action. Mr. Thomas was of the view that I ought to convert this originating
i summons to a writ action. I further asked him if he was aware that if that was done then the plaintiffs ought to be allowed to adduce oral evidence through witnesses. His answer was an unequivocal yes.

I then enquired of Mr. CM Phang if he was willing to accept the concession of the second defendants' solicitors and if he intended to apply to convert his originating summons to one of a writ action. Confusion became even more confounded when Mr. CM Phang refused such an offer and insisted that I accede to his request to accept a fresh affidavit in the interest of justice. I then invited both Counsel to address me as to the plaintiffs' right to adduce fresh or further evidence on the *Ladd v. Marshall* [1954] 3 AER 745 principle. It then became obvious that neither party was prepared to argue on this in spite of both of them being invited to address me on this issue.

I therefore ruled that I would refuse to allow for any further affidavit to be filed and I further ruled that I would deliver judgment on 19 December 1995 as previously fixed. In *Asiatic Development Bhd. & Anor. v. Balachandar a/l Palanysamy* [1995] 3 MLJ 445 which was a road accident case the sergeant who investigated the case gave evidence that he had found some scratch marks near the centre of the road close to the place where the motorcycle fell. But he stated in his examination-in-chief and cross-examination that these marks had been there before the accident and were therefore not caused by the accident. Judgment was delivered and there was an appeal. However in the police case where the second appellant was prosecuted the sergeant gave evidence that the scratch marks were made during the accident. There was therefore a clear contradiction in his evidence and the appellants' Counsel then applied to adduce the sergeant's evidence given in the police case, as fresh evidence on the civil appeal.

Mahadev Shankar JCA held that the evidence may have been admissable because it was not available during the civil trial. However since the sergeant's views were purely subjective and such evidence being inadmissable, the application was rejected. His Lordship adopted with approval the decision in *Ladd v. Marshall* which was followed by Suffian FJ (as he was then) in the Federal Court in *Lam Soon Sim v. Government of Malaysia* [1970] 2 MLJ 70, at 70 wherein His Lordship said regarding receipt of fresh evidence:

> To justify the reception of this evidence, three conditions must be fulfilled.
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
>
> Secondly, the evidence must be such that, if given, it would probably have an important influence in the result of the case, although it need not be decisive;
>
> Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. These were the tests enunciated by Denning LJ (as he then was) at p. 748 in *Ladd v. Marshall.*

It is obvious that the plaintiff would in this present case fail the first test. Robert Neil Breeden had already affirmed in an earlier affidavit dated 13 October 1995 that he had obtained the certificates in question from a customer called Low Tick. If that was so the plaintiffs ought to have obtained an affidavit from Low Tick at the same time. No reason was given as to the delay.

Finally, I must say that notwithstanding Mr. Thomas's concession that the matter ought to be converted to a writ action I ruled against the same. The Originating Summons was fully argued before me by both Counsel and the related issues were aptly canvassed. If Counsel erroneously make a concession it is the duty of the Court as the proper arbiter to see if the said concession is acceptable. In my view acceding to the second defendants' request, which incidentally was not even taken up by the plaintiffs' Counsel, is akin to giving the plaintiffs a second bite at the cherry. This the Court is loathe to do.

I therefore dismiss the plaintiffs' application with costs.

Reported by Jasmesh Kaur